United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-1580

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-1580

UNITED STATES OF AMERICA,

Appellee,

- against -

SAMUEL KAPLAN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING OR REHEARING EN BANC

DAVID G. TRAGER
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Eastern District of New York.

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PRELIMINARY STATEMENT

The UNITED STATES OF AMERICA by DAVID G. TRAGER, United States Attorney for the Eastern District of New York, hereby petitions for rehearing en banc of the judgment of a panel entered October 15, 1974, which reversed the judgment of conviction and remanded the case to the district court. The petition for rehearing en banc

is filed pursuant to Rule 35(a) of the Federal Rules of Appellate Procedure which provides that, although such petitions are not favored, that they are appropriate "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions***"

STATEMENT

1. Following a jury trial before United States District Judge Jack B. Weinstein appellant was convicted, in two counts, of violating Title 21, United States Code, Section 841(a)(1), and sentenced to eight years in prison. At the trial, the evidence showed that the undercover agent, Alleva, had narcotics dealings with one, Lange, during November and December of 1971. On one occasion, Lange sold Alleva an ounce of heroin. On January 5, 1972, Alleva spoke with Lange again and complained about the quality of the narcotics he had previously purchased. Lange, in turn, told Alleva to come to his home the next day and, further, that "his connection would be there with him."

Because it was anticipated that the evidence would show that appellant was with Lange the next day, defense counsel objected to the introduction of the above quoted hearsay statement. At the trial, the United States urged that there was sufficient evidence to allow reception of the statement under the co-conspirator's exception to the hearsay rule. That evidence consisted of appellant's presence the next day at Lange's home and his engaging in conversation which was unmistakably related to the impending

sale of heroin.* Judge Weinstein, however, though agreeing in principle that the statement could, under the co-conspirator's exception to the hearsay rules, be admitted for its truth, nevertheless concluded that, "in order to protect the defendant fully," he would allow the jury to consider the statement only as it bore on Alleva's state of mind. Thereafter, when the statement was admitted, Judge Weinstein gave limiting instructions.

2. On October 15, 1974, a panel of this Court reversed the judgment of conviction on the ground that, although the disputed evidence could technically be admitted to show state of mind, the jury was incapable of following those instructions and would in fact consider it "as evidence

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* After a one ounce package of heroin was delivered to Alleva by Lange, Alleva looked at both appellant and Lange and stated: "Either one of you or both of you are going to have to come down with me to get the money". Without responding, Lange turned to appellant. Appellant, in turn, inquired of Alleva: "Why do we have to go down and get the money". Alleva responded: "Because you guys beat me once, you're not going to do it again". Once more Lange turned to appellant. Appellant then motioned to Lange and said: "All right, go down and get the money". Lange then moved towards Alleva. Before Alleva exited the room with Lange, however, he asked appellant about the quality of the substance he had just purchased. Appellant stated: "It's five hit stuff. I hit the same stuff five times myself" (Trial transcript, pp. 28-31).

that appellant was in fact Lange's connection." Accordingly, "appellant is entitled to a new trial at which this evidence will be excluded" (Slip op. 5797). Having thus decreed a new trial where the disputed evidence would be excluded, the panel then went on to hold that in fact this evidence could be admitted - without any limiting instructions whatever - under the co-conspirator exception to the hearsay rule; and that, had the district court judge made the "findings" necessary to support the admission of such evidence, they "would have been highly likely to stand an appeal" (Slip op. 5801). However, because those findings were not made, the panel held that a reversal of the judgment of conviction and "presumably a new trial" (Slip op. 5802, n.4) was required.

REASONS FOR GRANTING THE
PETITION FOR REHEARING

1. The holding of the panel in this case- a panel which included but a single judge of the Court of Appeals for the Second Circuit - marks a substantial break with the well settled law. Until the appeal in this case was decided, it was clear beyond peradventure that where evidence was admitted at trial on an erroneous ground, a reversal of the conviction and a new trial was not required if evidence was otherwise admissable on another ground. United States v. Rosenstein, 474 F.2d 705 (C.A.2); United States v. Glasser, 443 F.2d 994 (C.A.2); United States v. Frank, 494 F.2d 145, 156 (C.A.2). A new trial was necessary only if the evidence was found by the court of appeals to be admissable for a purpose more limited than that for which it was admitted by the trial court. Under such circumstances, the absence of limiting instructions would plainly prejudice the defendant and require a second trial. See e.g. Shepard v. United States, 290 U.S. 96; United States v. DeMasi, 445 F.2d 251 (C.A.2) certiorari denied, 404 U.S. 882.

Here quite plainly, that exception to the general rule was inapposite. On the contrary, here the evidence

was admitted by the district court - with an appropriate instruction - for the limited purpose of showing a witness' state of mind. The panel concluded not that the state of mind exception was technically inapplicable here, but that under the circumstances, the jury would not be able to follow the cautionary instruction and consider it for that limited purpose. But, since the panel concluded that the district court could well have admitted the evidence without any limiting instructions and for a far wider purpose, it is plain that the defendant was the beneficiary of the error committed by the district court. As such, the stated reason for the panel's decision to vacate the judgment of conviction, cannot be reconciled with the law of this Circuit.

Thus, the panel held that "the availability of this exception [the co-conspirator exception] depended upon findings that were for the trial judge to make in the first instance" and that "the decisive point now is that the findings were not made." (Slip op. 5801):

> It is not enough to suppose that the judge "would have" or "might have" made them. The fact is he did not. And it was for him, not for an appellate court, to confront and assess the evidence at the point of decision. In the absence of any such decision, this is in the class of cases where "the grounds upon which the ... [ruling] is based are those upon which it must be judged. Cf. S.E.C. v. Chenery Corp., 318 U.S. 80, 88, 93-94, 63 S. Ct. 454, 87 L. Ed. 626." Oser v. Wilcox, 338 F.2d 886, 893 (9th Cir. 1964). See also In re Adoption of a Minor, 194 F.2d 325, 326 (D.C. Cir., 1952); Amador Beltran v. United States, 302 F.2d 48, 52 (1st Cir. 1962); Dubern v. Girard Trust Bank, 454 F.2d 565, 571 (3d Cir. 1972).

While the panel was thus content to rely upon inapposite holdings of other courts of appeal, it ignored altogether the opinion of Judge Mulligan (for himself, then Judge Kaufman and Judge Smith) in United States v. Rosenstein, 474 F. 2d 705, 711 (C.A.2). There, in a case not materially distinguishable from the instant case,_/ evidence was admitted erroneously by the district court under the business records exception to the hearsay rule. In concluding that a reversal of the judgment of conviction was not required because the evidence could have been admitted under the co-conspirator exception to the hearsay rule, Judge Mulligan squarely rejected the reasoning adopted by the panel here. Judge Mulligan wrote (474 F.2d 711-712, emphasis added):

> In our view Judge Croake could have properly made the determination that the Government had laid a proper foundation for the admission of these documents as statements of co-conspirators made in furtherance of this continuing scheme to defraud the United States of taxes. The fact is that he made no such ruling and none was requested.

_/ Actually, to the extent that the cases are distinguishable, there is even less reason here than in Rosenstein for a reversal of the judgment of conviction; for here, unlike Rosenstein, the "error" by the district was in admitting the evidence for a more limited purpose than that for which it would have been admitted. Accordingly, the defendant was the beneficiary of an erroneous limiting instruction.

> We nonetheless hold that this court can make the post hoc determination on appeal.
>
> We should emphasize that the function of determining whether or not the proper foundation for the admission of these documents has been made is judicial and that the jury may not properly reassess the propriety of the court's determination.

Judge Mulligan further observed (474 F.2d 713, emphasis added:

> In sum, the determination by an appellate court that the documents could appropriately have been found admissible by the trial judge as statements of co-conspirators, does not in any way impinge upon any jury function. No instructions of the trial judge were necessary either to caution the jury as to any limited purpose for which the documents were received or that they might review his assessment that a proper foundation was laid. It is difficult therefore to see any impropriety in now accepting alternate bases for admission of the questioned documents, any objections sought to be levelled on the alternative grounds can and have been made here./

Plainly, the holding by the panel here is inconsistent with the rationale and holding in Rosenstein and the petition for rehearing by the full Court should be granted to resolve this conflict.

/ Indeed, Judge Mulligan went on to cite with approval an other case (equally indistinguishable for the instant case), Orser v. United States, 362 F.2d 580 (C.A.5).

2. Over and above the plain conflict with the holding in Rosenstein, the reasoning of the panel here - if not overturned - will have the effect of needlessly requiring new trials in cases in which defendants have not been prejudiced by evidence properly admitted, albeit on erroneous grounds. Such a development should be of particular concern at a time when "enormous pressures are placed upon district court judges by an ever increasing criminal docket and a demand, expressed in part by Rules of the Second Judicial Council, for speedier trials of criminal defendants" United States v. Nazzaro, 472 F.2d 302,304 (C.A.2). Indeed, it was no doubt because this "conscientious and ingenious district court judge" (United States v. Weinstein, 452 F.2d 704,705 [C.A.2]) was particularly concerned about the possibility of an error that might require a second trial, that he admitted the disputed evidence for a much more limited purpose than that for which it could have been admitted.

We respectfully submit, that it would be irresponsible for the active judges of this Court to permit the adoption of a rule that would require a retrial in cases such as this when district court judges (particularly those in the Eastern and Southern Districts of New York) are desperately trying to give meaning to the policies reflected by the Speedy Trial Clause of the Sixth Amendment, Rule 50(b) of the Federal Rules of Criminal Procedure.

Moreover, we believe that the active judges of this Court bear a particularly important responsibility here "to secure [and] maintain uniformity of its decisions" (F.R. App. Pr. Rule 35(a)). The holding in this case can be described as a holding of panel of this Court only in the most technical sense; the panel was composed of but a single judge of this Court, a district court judge from the Central District of California and a district court judge from the Southern District of New York. We understand the unfortunate delays in filling vacancies that has necessitated the composition of panels such as that which decided the instant case; nevertheless we believe that special vigilance is required by the active judges of this Court to insure that there are no departures from the settled law of the Circuit.

Conclusion

The petition for rehearing, or in the alternative, for rehearing en banc should be granted.

Dated: November 12, 1974

Respectfully submitted

DAVID G. TRAGER
United States Attorney

EDWARD R. KORMAN
Chief Assistant United States Attorney
of counsel

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

IRENE B. COHEN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 12th day of November, 1974 he served a copy of the within

Petition for rehearing or rehearing en banc

by placing the same in a properly postpaid franked envelope addressed to:

James LaRossa, Esq.
LaRossa, Shargel & Fischetti
522 Fifth Avenue
New York, New York 10036

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Irene B. Cohen

Sworn to before me this
12th day of November, 1974.

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501965
Qualified in Kings County
Commission Expires March 30, 1975